NO. 48430-7-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

In re the Personal Restraint Petition of:

FORREST EUGENE AMOS,

Petitioner,

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR LEWIS COUNTY

The Honorable Richard Brosey, Judge

PERSONAL RESTRAINT PETITION SUPPLEMENTAL BRIEF

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TABLE OF CONTENTS

Page

A. ASSIGNMENTS OF ERROR IN SUPPORT OF PETITION ..1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF THE CASE.....3

D. ARGUMENT 8

1. THE PERSONAL RESTRAINT PETITION IS NOT VOID AB INITIO DESPITE THE PURPORTED WAIVER OF RIGHT TO APPEAL AND RIGHT TO COLLATERAL ATTACK BECAUSE THE PETITION RAISES ISSUES INVOLVING VOLUNTARINESS OF HIS NEGOTIATED PLEA, INEFFECTIVE ASSISTANCE OF COUNSEL, AND A FACIALLY INVALID OR VOID SENTENCE 8

a. The trial court erred in ordering that Mr. Amos serve his gross misdemeanor sentences in the custody of the department of corrections. 12

b. The waiver of appeal and collateral attack does not preclude a challenge to the voluntariness of the negotiated plea, ineffective assistance of counsel.....15

i. The fundamental right to the assistance of counsel is strictly protected.....20

ii. Any intrusions by the police or the prosecution into confidential communications are presumptively prejudicial.....24

2. THE PETITION FOR COLLATERAL RELIEF IS TIMELY 29

a. Invalidity on its face.....30

b. The petition was timely filed.....31

E. CONCLUSION 32

TABLE OF AUTHORITIES

WASHINGTON CASES Page

Heidebrink v. Moriwaki, 104 Wn.2d 392, 706 P.2d 212 (1985).....28
In re Coats, 173 Wn.2d 123 267 P.3d 324 (2011).....30
In re Pers. Restraint of Gardner, 94 Wash.2d 504, 617 P.2d 1001 (1980).....12
In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).....1, 11
In re Pers. Restraint of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002).....30
In the Restraint of Hews, 99 Wash.2d 80, 660 P.2d 263 (2009).....16
In re Personal Restraint of Hinton, 152 Wn.2d 853, 100 P.3d 801 (2004).....11
In re Pers. Restraint of McKiearnan, 165 Wn.2d 777, 783, 203 P.3d 375 (2009).....30
In re Pers. Restraint of Moore, 116 Wash.2d 30, 803 P.2d 300 (1991).....11
In re Schafer, 149 Wn.2d 148, 160, 6 P.3d 1036 (2003).....21
In re Pers. Restraint of Tobin, 165 Wn.2d 172, 196 P.3d 670 (2008).....30
State v. Barr, 99 Wash.2d 75, 658 P.2d 1247 (1983).....12
State v. Besio, 80 Wn.App 426, 907 P.2d 1220 (1995).....2,11,13,14,15,19
State v. Christopher, 20 Wn.App. 755, 583 P.2d 638 (1978).....10, 13, 14
State v. Cooper, 63 Wn.App.8, 816 P.2d 734 (1991).....9
State v. Cory, 62 Wash.2d 371, 382 P.2d 1019 (1963).....2, 16, 20, 22, 24, 28, 32
State v. Eilts, 94 Wash.2d 489, 617 P.2d 993 (1980).....12
State v. Fuentes, 179 Wn.2d 808, 318 P.2d 808 (2014).....29
State v. Granacki, 90 Wn.App. 598, 959 P.2d 667 (1998).....23, 24, 28
State v. Lenarz, 22 A.3d 536, 549 (Conn. 2011).....25
State v. Linnemeyer, 54 Wn.App. 767, 776 P.2d 151 (1989).....10, 13
State v. Mollichi, 132 Wash.2d 80, 936 P.2d 408 (1997).....9
State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 558 (2011).....25
State v. Pavlyk, 115 Wn.2d 457, 800 P.2d 338 (1990).....28
State v. Pena Fuentes, 179 Wn.2d 808, 819, 318 P.3d 257 (2014).....25

State v. Perkins, 108 Wash.2d 212, 737 P.2d 250.....9
State v. Perrow, 156 Wn.App. 322, 231 P.3d 853 (2010).....2, 3, 6, 21, 32
State v. Thompson, 141 Wn.2d 712, 380 10 P.3d 380 (2000).....11

UNITED STATES CASES **Page**

United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir.), cert. denied, 508 U.S. 979, 113 S.Ct. 2980, 125 L.Ed.2d 677 (1993).....18
United States v. Craig, 985 F.2d 175, 178 (4th Cir.1993).....18
DeRoo v. United States, 223 F.3d 919 (8th Cir.2000).....1, 17, 19
United States v. Goings, 200 F.3d 539, (8th Cir.2000).....17
United States v. Henderson, 72 F.3d 463, (5th Cir.1995).....18
Hill v. Lockhart, 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).....18
Jones v. United States, 167 F.3d 1142 (7th Cir.1999).....17
McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970).....18
United States v. Michelsen, 141 F.3d 867 (8th Cir.), cert. denied, 525 U.S. 942, 119 S.Ct. 363, 142 L.Ed.2d 299 (1998).....17
Missouri v. Frye, *U.S.* , 132 S. Ct. 1399, 1406-07, 182 L. Ed. 2d 379 (2012).....26
United States v. Morrison, 171 F.3d 567, (8th Cir.1999).....18
U.S. v.Nobles, 422 U.S. 225, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975).....27
United States v. Rutan, 956 F.2d 827 (8th Cir.1992).....17
Tollett v. Henderson, 411 U.S. 258, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973).....18

REVISED CODE OF WASHINGTON **Page**

RCW 5.60.060(2)(a).....21
RCW 9A.20.020(2).....6
RCW 9A.20.021.....7, 10, 19
RCW 9A.20.021(2).....1, 11
RCW 9A.28.020(1).....13
RCW 9A.60.020.....13
RCW 9.92.020.....9, 10, 13, 19
RCW 9.94A.190 .....14, 31
RCW 10.73.090(1).....29, 30
RCW 10.73.090(3).....29, 30
RCW 69.50.401(2)(c).....13

CONSTITUTIONAL PROVISIONS	Page
U.S. Const., amend 5	16
U.S. Const., amend. 6	16
Wash. Const. art. 1, § 22	16

COURT RULE	Page
RAP 16.4 (c) (2)	2, 3

A. ASSIGNMENTS OF ERROR IN SUPPORT OF PETITION

1. The personal restraint petition challenges the voluntariness of the petitioner's plea agreement stemming from governmental interference in attorney-client communications during a search of the petitioner's jail cell. The seizure of materials prepared by the petitioner meant to assist his attorney and seizure of material marked "LEGAL MAIL" affecting the voluntariness of his negotiated plea agreement as a result of the seizure of petitioner's documents during the search of his cell. Because the issues raised in the petition involve (1) the voluntariness of the plea and effectiveness of counsel, and a (2) facially invalid order, the petition is not void ab initio and may be considered by this Court despite a waiver of the right to appeal and right to file collateral attack entered as part of the negotiated plea agreement. Petitioner urges the Court to adopt the doctrine outlined in *DeRoo v. United States*, 223 F.3d 919 (8th Cir. 2000), and permit the waiver of right to appeal and right to collateral attack to be "pierced" in some circumstances.

2. The petition also challenges a sentence imposed in violation of RCW 9A.20.021(2), rendering it void or facially invalid. The petition is not void ab initio and may be considered by this Court despite a waiver of the right to appeal and right to file collateral attack entered as part of the negotiated plea agreement under *State v. Besio* 80 Wn.App 426, 907 P.2d 1220 (1995) and *In re*

Pers. Restraint of Goodwin, 146 Wn.2d 861, 50 P.3d 618 (2002).

3. Petitioner's convictions should be dismissed due to governmental interference with privileged communication under *State v. Perrow,* 156 Wn.App. 322, 328, 231 P.3d 853 (2010), and *State v. Cory,* 62 Wn.2d 371, 382 P.2d 1019 (1963) , where law enforcement seized legal materials during the execution of a search warrant.

4. The trial court erred in ordering Mr. Amos to serve his sentence for two gross misdemeanor in the custody of the Department of Corrections.

5. Mr. Amos' petition is not untimely where the trial court entered an order vacating an Amended Judgment and Sentence on January 8, 2015, reinstating the original judgment and Sentence entered October 31, 2014. Clerk's Paper (CP) 149.

6. The petition was not untimely where the Judgment and Sentence is void under *State v. Besio.*

7. Petitioner is unlawfully restrained under RAP 16.4(c)(2).

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When the State violates the guarantee of confidential communication between attorney and client by seizing and presumably reading the privileged communications, dismissal is the mandatory remedy unless the State proves beyond a reasonable doubt there is no possibility of prejudice. Is there a possibility that Mr. Amos was prejudiced from the seizure and alleged

and review of privileged attorney client communication which requires dismissal?

2. Should the convictions be dismissed pursuant to *State v. Perrow*, where the State violated Mr. Amos' right to keep private his privileged work product and privileged communication with is counsel , where law enforcement seized his legal materials prepared to aid counsel and correspondence from his former trial counsel?

3. The trial court ordered the petitioner to serve his entire sentence for felonies and two gross misdemeanors, to be served consecutively, in the custody of the Department of Corrections. Did the trial court err in requiring the petitioner to serve the gross misdemeanor sentences in the custody of the Department of Corrections?

4. Was Mr. Amos' personal restraint petition timely where the trial court entered its order vacating the Amended Judgment and Sentence on January 8, 2015, and where the petition was mailed three days earlier?

5. Is the personal restraint petition timely where the Judgment and Sentence is void?

6. Is petitioner entitled to relief because he is unlawfully restrained under RAP 16.4(c)(2).

C. STATEMENT OF THE CASE

The State charged Forrest Amos with sixteen counts in an information filed December 3, 2013. On July 31, 2014, Mr. Amos pleaded guilty to the

following charges filed in a third amended information:

Count	Charge	Type of Crime
II	Tampering with a Witness	C
III	First degree computer trespass	C
IV	Possession of marijuana with intent to manufacture or deliver	C
V	Attempted possession of marijuana with intent manufacture or deliver	Gross Misdemeanor
VI	Attempted forgery	Gross Misdemeanor
VII	Possession of a controlled substance with intent to deliver	B
VIII	Delivery of a controlled substance	B
X	Delivery controlled third degree	Gross Misdemeanor
XI	Attempted theft second degree	Gross Misdemeanor
XII	Possession with intent	B
XIII	Delivery of a controlled substance	B
XIV	Delivery of a controlled substance	B
XV	Possession with intent	B
XVI	Delivery of a controlled substance	B

CP 194-99.

The plea agreement eliminated Count I in the original information,

which was Leading Organized Crime, a third strike offense for Mr. Amos under the Persistent Offender Accountability Act. CP 11-54. As part of the plea agreement, Mr. Amos agreed to waive his right to collateral attack of the conviction or appeal the judgment and sentence. CP83-84. The waiver, signed on August 20, 2014, provides as follows:

> I agree that the plea agreement that has been negotiated for me in this case in my best interest and requires that I waive certain rights that I might otherwise possess. Specifically, I waive any right I might have to maoint a motion to withdraw my plea of guilty or to initiate any appeal as to my plea of guilty. I also waive any right I might have to attack the judgment and sentence that will be entered against me in this case, either by collateral attack or appeal.
>
> I recognize that by entering this waiver, my plea of guilty and the judgment and sentence will be final. I will no longer possess any rights to appeal, to initiate personal restraint petitions, or any other forms of relief regarding my plea of guilty or the judgment and sentence in this matter.
>
> CP 83-84. Report of Proceedings[1] (RP) (08/20/14) at 3-10.

Mr. Amos was sentenced in Lewis County Superior Court on August 20, 2014 to a total period of confinement of 120 months for the felony matters. CP 85-97. The court ordered 364 days for gross misdemeanors charged in Counts 5 and 6, and ordered Counts 5 and 6 to run consecutively to all felony counts and consecutive to each other, for a total of 144 months in

[1] The record of proceedings consists of the following sequentially paginated hearings: RP– July 10, 2014; July 18, 2014; July 24, 2014; July 31, 2014; August 20, 2014; January 8,

the Department of Corrections. CP 90.

The case remained undisturbed until August 28, 2014, when the State took steps to amend the judgment and sentence after receiving an email from the Department of Corrections directing removal of confinement for the gross misdemeanor counts and "correct the total confinement time to 120 months" in order to comply with RCW 9A.20.020(2). States response, Appendix P. The sentence was modified at a hearing on October 31, 2014, without Mr. Amos' presence. CP 98-99. Mr. Amos objected to the modification and moved for resentencing within the standard range. At a hearing on January 8, 2015, the court agreed and vacated the Amended Judgment and Sentence and reinstated the sentence that was previously entered on August 20, 2014. RP (1/8/15) at 12; CP 149.

On January 5, 2015, Mr. Amos filed a Personal Restraint Petition, challenging his convictions and requesting dismissal of the convictions pursuant to *State v. Perrow*, 156 Wn.App. 322, 231 P.3d 853 (2010), or alternatively, to vacate the 24 month period imposed in the Department of Corrections for the two gross misdemeanors Count 5 and 6, and resentencing him to the "remaining valid portion" of his sentence of 120 months, and either dismiss the misdemeanor counts or run with the counts concurrently with the

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2015; and January 14, 2015;

felony counts. Personal Restraint Petition at 24. In his petition, Mr. Amos argued that he is entitled to relief on the following grounds:

(1) He received ineffective assistance of counsel as a result of governmental intrusion into his attorney-client privileged communication when his cell was searched and documents, including materials prepared for his trial counsel, were seized by law enforcement;

(2) He received in effective assistance of counsel when counsel advised him to accept the state's offer which included waiver of his right to appeal and his right of collateral attack;

(3) He received a unlawful sentence for the gross misdemeanors in Count 5 and 6. Under RCW 9A.20.021(2), gross misdemeanor must be served in county jail, whereas the court in this case sentenced Mr. Amos to 24 months for Counts 5 and 6, to be served concurrently with the felony charges in prison. Accordingly, Mr. Amos argues that he must be resentenced to 120 months in prions and the additional 24 months should be served concurrently or dismissed;

(4) The prosecuting attorney breached the plea agreement that he would recieve 144 months in the Department of Corrections. RP (7/31/14) at 18. However, at sentencing the deputy prosecutor first alluded to the possibly that he may not be able to remain in the DOC for the 24 months to be served

for the gross misdemeanors. RP 8/20/14) at 5;

(5) And that the court refused to sign an order of indigneey and asked that this petition be redesignated as an appeal. Petition at 14-18. only The State filed a Response to Personal Restraint Petitions on April 8, 2015. The state argues, inter alia, in its response that the PRP is time barred ant that the one year period to file collateral attack expired August 20, 2015, and that Mr. Amos waived his right to collateral attack of the conviction and sentence. State's Response at 5.

Mr. Amos filed his personal restraint petition on January 5, 2016 from Stafford Creek Corrections Center. See Declaration of Service by Mail. HE submits that Under GR 3.1(c), the petition was filed within one year of the court's order vacating the amended judgment and Sentence.

This Court appointed undersigned counsel to represent Mr. Amos, and in particular to address whether the waiver precludes Mr. Amos from raising the issues contained in his petition.

D. ARGUMENT

1. THE PERSONAL RESTRAINT PETITION IS NOT VOID AB INITIO DESPITE THE PURPORTED WAIVER OF RIGHT TO APPEAL AND RIGHT TO COLLATERAL ATTACK BECAUSE THE PETITION RAISES ISSUES INVOLVING VOLUNTARINESS OF HIS NEGOTIATED PLEA, INEFFECTIVE ASSISTANCE OF COUNSEL, AND A FACIALLY INVALID OR VOID SENTENCE

In Mr. Amos' plea agreement, the prosecutors agreed to dismiss without prejudice one count of Leading Ongoing Crime , a strike offense. In exchange, Amos agreed to waive his right to withdraw the plea of guilty or to initiate any appeal as to my plea of guilty, and also waived his right to challenge the judgment and sentence either by collateral attack or appeal. CP 83-84.

On October 31, 2014, the State filed an Amended Judgment and Sentence following an email from the Department of Corrections directing that the Judgment and Sentence be modified to comply with RCW 9.92.020. CP 98-99. Mr. Amos contested the amendment, and the prior sentence was reinstated on July 8, 2015. CP 149. Mr. Amos sought an Order of Indinecy in order to file notice of appeal, but was denied by the court. Petitioner at 18-19. Mr. Amos timely mailed the petition on January 5, 2015.

As an initial matter, it is well settled that a criminal defendant may, as part of a negotiated plea agreement, waive constitutional and statutory rights, including rights under the Sentencing Reform Act and the right to appeal. *State v. Perkins*, 108 Wn.2d 212, 737 P.2d 250 (1987); *State v. Mollichi*, 132 Wn.2d 80, 89 n. 4, 936 P.2d 408 (1997) (criminal defendants may, expressly or impliedly, waive constitutional rights to counsel, to speedy public trial, to

jury trial, to be free from self-incrimination, or to be tried in the county where the crime was committed, and may waive statutory rights, such as the right to have restitution determined within the statutory time limit); *State v. Cooper*, 63 Wn.App. at 13-14, 816 P.2d 734 (1991).

In his petition, Mr. Amos challenges his convictions and resulting sentence. The court sentenced Mr. Amos to one year's confinement for each of two gross misdemeanors charged in Counts 5 and 6, to be served consecutive to each other and the felony counts. CP 90. The judgment and sentence states that the term of total confinement, including the two consecutive one year sentences for Counts 5 and 6 will be served in the custody of Department of Corrections. CP 90. RCW 9.92.020 provides in part:

> Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force at the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days[.]

RCW 9A.20.021 provides in relevant part:

> Every person convicted of a gross misdemeanor defined in Title 9A RCW shall be punished by imprisonment in the county jail for a maximum term fixed by the court of up to three hundred sixty-four days[.]

A Judgment and Sentence that orders imprisonment for a gross

misdemeanor in a place contrary to that provided by statute, the sentence is void. "'[W]here the law provides a place of imprisonment, the court cannot direct a different place, and if it does so the sentence is void.' " *State v. Linnemeyer*, 54 Wn.App. 767, 770, 776 P.2d 151 (1989) (quoting *State v. Christopher*, 20 Wn.App. 755, 763, 583 P.2d 638 (1978)).The SRA contains no authority for a defendant who, in a single judgment and sentence, receives a felony sentence in excess of one year and a consecutive gross misdemeanor sentence to serve the misdemeanor portion of the sentence in a DOC facility. *State v. Besio*, 80 Wn.App. 426, 430–32, 907 P.2d 1220 (1995). Instead, the court in *Besio* found that consecutive gross misdemeanor sentence must be served in county jail. *Id.* at 431.

Despite the purported waiver of his right to appeal and collateral attack, it is clear that Mr. Amos can challenge the sentence on the basis that the consecutive 24 month sentence for the gross misdemeanors cannot be served concurrently with the felony conviction in prison since that portion of the sentence is explicitly prohibited by RCW 9A.20.021(2) and by *Besio*.

The fact that a defendant agreed to a particular sentence does not cure a facial defect in the judgment and sentence where the sentencing court acted outside its authority. An individual cannot, by way of a negotiated plea agreement, agree to a sentence in excess of that allowed by law and thus

cannot waive such a challenge. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 867–72, 50 P.3d 618 (2002). See also, *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 861, 100 P.3d 801 (2004); *State v. Thom*pson, 141 Wn.2d at 723, 10 P.3d 380 (" '[T]he actual sentence imposed pursuant to a plea bargain must be statutorily authorized ....' ") (quoting *In re Pers. Restraint of Moore*, 116 Wn.2d 30, 38, 803 P.2d 300 (1991)). In *Goodwin*, the Court noted that " 'a plea bargaining agreement cannot exceed the statutory authority given to the courts.'" *Goodwin,* 146 Wn.2d at 869. (quoting *In re Pers. Restraint of Gardner*, 94 Wn.2d 504, 507, 617 P.2d 1001 (1980)). In short, a defendant simply "cannot empower a sentencing court to exceed its statutory authorization." *State v. Eilts*, 94 Wn.2d 489, 495–96, 617 P.2d 993 (1980) superseded by statute/rule on other grounds by *State v. Barr*, 99 Wash.2d 75, 658 P.2d 1247 (1983).

Here, the sentence imposing prison time for the misdemeanor charges to be served concurrent to felony convictions in a single judgment and sentence is void therefore challenged by collateral attack.

a. <u>THE TRIAL COURT ERRED IN ORDERING THAT MR. AMOS SERVE HIS GROSS MISDEMEANOR SENTENCES IN THE CUSTODY OF THE DEPARTMENT OF CORRECTIONS.</u>

As noted *supra*, The court sentenced Mr. Amos to one year's

confinement for each of the gross misdemeanors charged in Counts 5 and 6 for attempted possession of marijuana with intent to manufacture or deliver, and Count 6 for attempted forgery, to be served consecutive to each other and the felony counts. CP 90. The judgment and sentence states that the term of total confinement, including the two consecutive one year sentences for Counts 5 and 6 will be served in the custody of Department of Corrections. CP 91. Attempted possession of marijuana with intent to manufacture or deliver and attempted forgery are gross misdemeanors. RCW 69.50.401(2)(c); RCW 9A.60.020; RCW 9A.28.020(1). Counts 2-4, 7, 8, 12-16 are felonies. "Every person convicted of a gross misdemeanor for which no punishment is prescribed in any statute in force the time of conviction and sentence, shall be punished by imprisonment in the county jail for a maximum term fixed by the court of not more than one year[.]" RCW 9.92.020 (2009).

"[W]here the law provides a place of imprisonment, the court cannot direct a different place, and if it does so the sentence is void." *State v. Linnemeyer*, 54 Wn. App. 767, 770, 776 P.2d 151 (1989) (internal quotation marks omitted) (quoting *State v. Christopher*, 20 Wn. App. 755, 763, 583 P.2d 638 (1978)). "The sentence for a misdemeanor or gross misdemeanor must be served in the county jail. This remains true even if the defendant receives consecutive sentences exceeding 1 year." 13B Seth A. Fine and

Douglas J. Ende, Washington Practice: Criminal Law § 4201 (2d ed.1998) (citing *State v. Besio*, 80 Wn. App. 426, 429-30, 907 P.2d 1220 (1995).

The Sentencing Reform Act of 1981(SRA), chapter 9.94A RCW, applies to felony convictions only and provides no authority for a defendant who, in a single judgment and sentence, receives a felony sentence in excess of one year and a consecutive gross misdemeanor sentence to serve the misdemeanor portion of the sentence in a DOC facility. *State v. Besio*, 80 Wn.App. 426, 430–32, 907 P.2d 1220 (1995) (and SRA provisions cited therein). Therefore, the consecutive gross misdemeanor sentence must be served in county jail. *Id.* at 431. The error is correctable by resentencing. Id. at 432; see *Christopher*, 20 Wn.App. at 763.

Despite the clear authority to the contrary, the State argues in its response that the sentence of 144 months is lawful and that the term of the gross misdemeanors should be served in DOC consecutive to the felony charges. The State argues that *Besio* ignores RCW 9.94A.190 and "is incorrect and harmful and should not be followed by this Court" and that misdemeanors that are imposed consecutive to felonies should be served in the DOC. Response to Personal Restraint Petition, at 23. Under the Sentencing Reform Act of 1981, "[a] sentence that includes a term or terms of confinement totaling more than one year shall be served in a facility or

institution operated, or utilized under contract, by the state[.]" RCW 9.94A.190(1). This provision "encompasses only felony terms and not gross misdemeanor terms combined with felony terms." *State v. Besio*, 80 Wn. App. 426, 432, 907 P.2d 1220 (1995).Therefore, a trial court errs when it orders a defendant to serve an entire sentence for felonies and gross misdemeanors in the state correctional system. *Besio*, 80 Wn.App. at 429, 432. Here, the trial court erred when it ordered that Mr. Amos' consecutive one year sentences in Counts 5 and 6 be in the custody of DOC. Under *Besio* the remedy is that a remand is necessary to amend the judgment and sentence to reflect that the consecutive sentence for the gross misdemeanor either remove the confinement time for the misdemeanor counts from the felony judgment and sentence, or to run them concurrently to the felony count. Accordingly, Mr. Amos requests that the court impose a concurrent sentence for the gross misdemeanors or dismissal of the charges.

b. <u>THE WAIVER OF APPEAL AND COLLATEAL ATTACK DOES NOT PRECLUDE A CHALLNGE TO THE VOLUNTARINESS OF THE NEGOTIATED PLEA, INEFFECTIVE ASSISTANCE OF COUNSEL,</u>

The petition also challenges the convictions on the basis that his plea was rendered involuntary due to frustration of his privileged communication, affecting his ability to receive effective assistance Petitioner at 4-12.

The question in this case is whether the voluntariness of a guilty plea and the voluntariness of a waiver of the right to appeal and to collaterally attack a conviction may be raised in a personal restraint petition, despite the presence of the waiver purporting to bar collateral review. A review of Washington case law reveals no authority directly on point regarding the ability of a defendant to challenge a conviction following a purported waiver of appeal or collateral attack after a negotiated plea agreement. Counsel submits that the same reasoning this Court uses in deciding to review voluntariness issues on direct appeal should likewise be applied to voluntariness issues raised on collateral review, despite a purported waiver of right to appeal or collateral attack..

The Washington Supreme Court has held that the voluntariness of a guilty plea may be raised for the first time in collateral attack. See *In the Restraint of Hews*, 99 Wash.2d 80, 660 P.2d 263 (2009). The presence of a waiver of the right to collateral review should not bar review of the voluntariness of a guilty plea because an involuntary guilty plea will necessarily render the waiver involuntary and a waiver cannot be enforced if it is not voluntary. For this same reason, the voluntariness of the waiver itself may also be reviewed in a personal restraint petition. In addition, because ineffective assistance of counsel may, in some circumstances, render a guilty

plea involuntary (see e.g., *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963) , (effective representation of counsel, to which defendant is entitled under the state and federal constitutions, includes right to confer with counsel in private. U.S.C.A. Const. Amends. 5, 6; Const. art. 1, § 22)) . The petitioner submits that claims of ineffective assistance of trial counsel may also be raised in a collateral attack, despite a waiver of collateral review.

This doctrine of permitting a defendant to "pierce" a waiver of right to appeal and collateral attack is the conclusion reached in other jurisdictions. In *DeRoo v. United States*, 223 F.3d 919 (8th Cir.2000), the United States Court of Appeals for the Eighth Circuit stated:

> "There is no question in this circuit that a knowing and voluntary waiver of direct-appeal rights is generally enforceable. See *United States v. Goings*, 200 F.3d 539, 543 (8th Cir.2000). We also have enforced a defendant's plea agreement promise to 'waive his right to appeal, or challenge via post-conviction writs of habeas corpus or coram nobis, the district court's entry of judgment and imposition of sentence.' [United States v.] His Law, 85 F.3d [379,] 379 [(8th Cir.1996)]. This Court has not had prior occasion to address whether a defendant may waive [28 U.S.C. §] 2255 collateral-attack rights in a plea agreement. See Latorre [v. United States], 193 F.3d [1035,] 1037 n. 1 [(8th Cir.1999)].
>
> "As a general rule, we see no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights in the plea agreement context. See id. (citing *Jones v. United States*, 167 F.3d 1142, 1145 (7th Cir.1999)). The 'chief virtues' of a plea agreement are speed, economy, and finality. See *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir.1992). Those virtues are promoted by waivers of collateral appeal rights as much as

by waivers of direct appeal rights. Waivers preserve the finality of judgments and sentences, and are of value to the accused to gain concessions from the government. See id.

"However, such waivers are not absolute. For example, defendants cannot waive their right to appeal an illegal sentence or a sentence imposed in violation of the terms of an agreement. See *United States v. Michelsen*, 141 F.3d 867, 872 (8th Cir.), cert. denied, 525 U.S. 942, 119 S.Ct. 363, 142 L.Ed.2d 299 (1998). In addition, the decision to be bound by the provisions of the plea agreement, including the waiver provisions must be knowing and voluntary. See *United States v. Morrison*, 171 F.3d 567, 568 (8th Cir.1999).

"A decision to enter into a plea agreement cannot be knowing and voluntary when the plea agreement itself is the result of advice outside 'the range of competence demanded of attorneys in criminal cases.' *Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)); *Tollett v. Henderson*, 411 U.S. 258, 266–67, 93 S.Ct. 1602, 36 L.Ed.2d 235 (1973). Therefore, '[j]ustice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness.' *Jones*, 167 F.3d at 1145 (defendant convicted and entered into cooperation agreement before sentencing). We find the reasoning of Jones not only compelling, but logically required. A defendant's plea agreement waiver of the right to seek section 2255 post-conviction relief does not waive defendant's right to argue, pursuant to that section, that the decision to enter into the plea was not knowing and voluntary because it was the result of ineffective assistance of counsel. Other courts agree that a waiver of section 2255 rights does not automatically preclude a defendant from raising ineffective assistance of counsel claims in a post-conviction motion. See *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir.1995) ('dismissal of an appeal based on a waiver in the plea agreement is inappropriate where the defendant's motion to withdraw the plea incorporates a claim that the plea agreement generally and the defendant's waiver of appeal specifically, were tainted by ineffective assistance of counsel'); *United States v. Abarca*, 985 F.2d 1012, 1014

> (9th Cir.), cert. denied, 508 U.S. 979, 113 S.Ct. 2980, 125 L.Ed.2d 677 (1993) (stating waiver does not 'categorically' foreclose defendant's right to bring motion under section 2255 for ineffective assistance of counsel); see also *United States v. Craig*, 985 F.2d 175, 178 (4th Cir.1993) (per curiam) (holding waiver did not preclude Rule 32(d) motion challenging validity of waiver due to ineffective assistance of counsel)."
>
> *DeRoo*, 223 F.3d at 923–24.

Although waiver of the right to seek post-conviction relief given as part of a plea agreement is generally enforceable, it cannot operate to preclude a defendant from filing a petition challenging the voluntariness of the guilty plea, the voluntariness of the waiver, or counsel's effectiveness. Following the reasoning in *DeRoo* and cited authorities, Mr. Amos urges this Court to adopt a bright line rule permitting a petitioner to "pierce" a waiver in order challenge the effectiveness of counsel and voluntariness of the plea and accompanying waiver.

In this case, Mr. Amos contends that his guilty plea and his waiver of his right to appeal and to collaterally attack his conviction were involuntary because that he received ineffective assistance of counsel. Petitioner at 4.

First, counsel was ineffective because he advised Mr. Amos to enter a plea and seemingly waive his right to collateral attack. The "ethical hazard" created by this became evident a week later when the DOC notified the State that the sentence imposed was in violation of RCW 9A.20.021 and RCW

9.92.020, which require gross misdemeanors to be served in county jail. See also, *State v. Besio*, 80 Wn.App 426, 907 1220 (1995). This has created a *Kafkaesque reductio ad absurdum* where Mr. Amos received ineffective assistance of counsel and an apparently unlawful sentence, but is left with no mechanism through which to challenge the sentence due to the waiver of his right to collateral attack. See also, Personal Restraint Petition at 8.

i. The fundamental right to the assistance of counsel is strictly protected.

The more egregiousness and overt example of ineffective assistance of counsel in this case, however, occurred when the State deliberately violated Mr. Amos' right to a confidential attorney-client relationship which in turn affected the voluntariness of his plea and subsequent waiver. This occurred when law enforcement executed a search warrant of Mr. Amos cell. Petition at 9-10.

The right to the assistance of counsel is a bedrock procedural guarantee of a particular kind of relationship with counsel. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 145-46, 126 S.Ct. 2557, 165 L.Ed.2d 409 (2006); U.S. Const. amend. 6; Const. art. I, § 22. Its "essence" is the privacy of communication with an attorney. *United States v. Rosner*, 485 F.2d 1213, 1224 (2 Cir. 1973); see *Patterson v. Illinois*, 487 U.S. 285,nd 290 n.3, 108

S.Ct. 2389, 101 L.Ed.2d 261 (1988) (Sixth Amendment involves a "distinct set of constitutional safeguards aimed at preserving the sanctity of the attorney-client relationship").

It is "universally accepted" that effective representation cannot be had without private consultations between attorney and client. *State v. Cory*, 62 Wn.2d 371, 374, 382 P.2d 1019 (1963). The confidential attorney-client relationship is not only a "fundamental principle" in our justice system, it is "pivotal in the orderly administration of the legal system, which is the cornerstone of a just society." *In re Schafer*, 149 Wn.2d 148, 160, 6 P.3d 1036 (2003). The confidentiality of discussions between attorney and client has been protected for centuries. *Id.* It is inextricably intertwined with the adversarial system of justice, which demands that the lawyer must know all the relevant facts to advocate effectively, and presumes that clients will not provide lawyers with the necessary information unless the client knows what he says will remain confidential. *Id.* at 160-61; see RCW 5.60.060(2)(a) (attorney "shall not" be questioned about "any communication made by the client"); RPC 1.6 (lawyer "shall not reveal confidences or secrets" relating to client); RPC 4.4 (attorney may not intrude into other's attorney-client relationship).

Even when armed with a search warrant authorizing the police to seize

documents, the warrant does not empower the police to breach the attorney-client privilege. *State v. Perrow*, 156 Wn.App. 322, 328, 231 P.3d 853 (2010). In *Perrow,* the police were authorized to seize a range of written materials when executing a search warrant. *Id.* at 329. A detective took documents that included notes the defendant wrote for a meeting with his attorney about the allegations. *Id.* at 326. Although the defendant was not yet charged, he was aware of the investigation and had retained an attorney. Id. The Court of Appeals ruled that "the writings seized from Mr. Perrow's residence were protected by the attorney-client privilege" and the State's seizure violated that privilege. *Id.* at 330. The court held "it is impossible to isolate the prejudice presumed from the attorney-client privilege violation." *Id.* at 332.

In *Cory*, a sheriff's deputy eavesdropped in a jail conversation between the defendant and his lawyer. *Cory*, 62 Wn.2d at 372. There was no evidence the deputy told the prosecutor about it, but the court presumed some information would have been conveyed and the defendant could not know if the State used it to shape the investigation or prosecution. *Id.* at 377 n.3. "If the prosecution gained information which aided it in the preparation of its case" then the violation of the attorney-client relationship infected the proceedings. Id. at 377.

In this case, dismissal is warranted when the State's intrusion into Mr.

Amos' attorney-client communications is both deliberate and egregious. Second, the State's intrusion is deliberate and egregious when the intercepted communications are those between the defendant and his counsel in the case being tried. For instance, in *Cory,* the defendant met with his attorney to discuss his case in a private jail room, where a sheriff's deputy had secretly installed a microphone to eavesdrop on their conversations. *Id.* at 372, 382 P.2d 1019. The Washington Supreme Court concluded that dismissal was the only appropriate remedy, because it was impossible to isolate the resulting prejudice. *Id.* at 377–78, 382 P.2d 1019. The officer's "shocking and unpardonable" conduct deprived *Cory* of his right to effective counsel, vitiating the entire proceeding. *Id.* at 378, 382 P.2d 1019.

In *State v. Granacki,* during trial recess, a detective read defense counsel's trial notes and engaged in a discussion with a sitting juror. 90 Wash.App. 598, 600, 959 P.2d 667(1998) . The trial court declared a mistrial. *Id.* at 601, 959 P.2d 667. After briefing, the trial court concluded the detective had intentionally read counsel's notes and that dismissal based on that conduct was warranted. *Id.* Division One acknowledged that the intrusion into Granacki's right to counsel was less egregious than the eavesdropping in Cory, but was nonetheless analogous, so it was within the trial court's discretion to dismiss. *Id.* at 603–04, 959 P.2d 667. Both the *Cory* and *Granacki* courts

found dismissal appropriate to discourage such deliberate and egregious intrusions into the defendant's attorney-client privilege. *Id.* A defendant's constitutional right to the assistance of counsel unquestionably includes the right to confer privately with his or her attorney. *Cory*, 62 Wash.2d at 373–74, 382 P.2d 1019. In *Cory*, the seminal Washington case on this issue, the court dismissed a defendant's charges with prejudice because of an appalling decision by the sheriff to install a microphone in the jail's conference room and eavesdrop on conversations between the defendant and his attorney during trial. *Id.* at 372, 378, 382 P.2d 1019.

The *Cory* court presumed prejudice arising from the eavesdropping that occurred during trial. *Id.* at 377 & n. 3, 382 P.2d 1019 ("we must assume that information gained by the sheriff was transmitted to the prosecutor" and therefore "[t]here is no way to isolate the prejudice resulting from an eavesdropping activity, such as this"). However, the Court did not directly address whether all eavesdropping is per se prejudicial or if the presumption of prejudice is rebuttable.

Here, the State argued that the search is not relevant because the material was not read by the prosecution. This position, whoever, overlooks *Granacki*, in which the Court hold that when a detective views defendant's notes about attorney communications, the State has irreparably intruded into

attorney-client privilege even if information not given to prosecutor.

In *Granacki*, a police detective admittedly intentionally read a legal pad containing privileged notes between a defendant and his attorney. State v. *Granacki*, 90 Wn.App. 598, 959 P.2d 667 (1998). Like the defendant in Cory, the State intentionally intruded on privileged and private communications. *State v. Cory*, 62 Wn.2d 371, 382 P.2d 1019 (1963). The remedy in both cases was dismissal. *Granacki*, 90 Wn.App. at 602.

The *Granacki* Court further held that on a motion to dismiss based on government misconduct that has interfered with a defendant's foundational right to privately communicate with his attorney, the State has the burden to show beyond a reasonable doubt that the defendant was not prejudiced. Granacki, 90 Wn.App. at 602 n.3, State v. Fuentes, 179 Wn.2d 808, 820, 318 P.2d 808 (2014). Prejudice is presumed. Id. at 812.

ii. Any intrusions by the police or the prosecution into confidential communications are presumptively prejudicial.

The State's violations of attorney-client privilege are punished because they harm the functioning of the adversarial system. Like a prosecutor's use of racial stereotypes to urge a conviction, a deliberate intrusion by the police or prosecution into private communications between attorney and client is "repugnant to the concept of an impartial trial" in an

adversarial system. See *State v. Monday*, 171 Wn.2d 667, 680, 257 P.3d 558 (2011).

Eavesdropping on an attorney-client conversation is presumptively prejudicial. *State v. Pena Fuentes*, 179 Wn.2d 808, 819, 318 P.3d 257 (2014). Dismissal is mandatory unless the prosecution proves, beyond a reasonable doubt, "there is no possibility of prejudice." Id. at 819-20.

The possibility of prejudice is not resolved by merely excluding the improperly gathered evidence from being used substantively at trial. The possibility of prejudice exists if the information is used to shape strategy. See *State v. Lenarz*, 22 A.3d 536, 549 (Conn. 2011). Eavesdropping may aid the State's investigation. *Pena Fuentes*, 179 Wn.2d at 821. Gaining insight into and assurance about the defendant's trial strategy helps the prosecution select jurors, guides the investigation, and cements its theory. *Lenarz*, 22 A.3d at 551 n.16. A prosecution involves a "host of discretionary decisions," and may be both "consciously and subconsciously factored into the prosecutor's decisions before and during trial," making it impossible to parse its effect on the state's decisions. *Briggs v. Goodwin*, 698 F.2d 486, 494-95 (D.C. Cir. 1983).

For example, plea bargaining is a "central" aspect of the criminal justice system and a "critical phase of litigation" that depends on confidential

communications between attorney and client. *Missouri v. Frye*, U.S., 132 S. Ct. 1399, 1406-07, 182 L. Ed. 2d 379 (2012). "In today's criminal justice system . . . the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant. *Id.* A defense attorney's failure to convey a plea bargain constitutes ineffective assistance of counsel, even if the accused person received a fair trial. *Id.* Similarly, if the State's intrusion into attorney- client communications affects the possibility of a negotiated settlement, it necessarily prejudices the accused person.

The state continued its investigating of Mr. Amos after his arrest regarding other alleged offenses, including witness tampering, and obtained a search warrant to search his jail cell. The state was aware the material included legal materials. Mr. Amos told the officer executing the search warrant that his papers included material subject to attorney client privilege, and material that he prepared notes at his attorney's request for use in his defense. Petition at 9. Despite his notification, the papers, letters and material was placed in a clear plastic garbage bag and removed from the cell. The seized material was reviewed in chambers by Judge Nelson Hunt.

The search by the State into the attorney client privilege is presumed to be prejudicial. The State cannot prove the absolute absence of prejudice to Mr. Amos. The State claims it did not read the material, which is a reasonable

claim—the purpose of the search warrant was look for evidence of crimes that may be contained in written mater, not an effort by the State to encourage recycling or to help keep Mr. Amos' cell clean and tidy. Instead the purpose was obtain and then read the seized material, which was held by law enforcement for several weeks before the *in camera* review. Mr. Amos asserts that the material was read, the State, perhaps unsurprisingly, denies that assertion. The logical implication is that the material was read.

Accordingly, Mr. Amos submits that the intrusion into the cell and seizure of legal material affected the voluntariness of his plea. In accordance with *Perrow*, Mr. Amos seeks dismissal of the convictions in their entirety.

Here, the State interfered with that privilege when it went through and bagged his material including mail clearly marked "Legal Mail". The work product doctrine recognizes "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel proper preparation of a case demands that he assemble information, sift the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference." *U.S. v.Nobles*, 422 U.S. 225, 237, 95 S.Ct. 2160, 45 L.Ed.2d 141 (1975) (internal citation omitted). Work product consists of interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs. *Id.*

The work product protection belongs to the attorney as well as the client and applies to criminal litigation as well as civil. *Id.* 236; 238-39. CrR 4.7(f)(1) provides that disclosure is not required of legal research or of records, correspondence, reports, or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies with certain qualifications. This rule has been applied to include defense work product. *State v. Pawlyk,* 115 Wn.2d 457, 477, 800 P.2d 338 (1990).

Under Washington law, work product documents do not need to be personally prepared by counsel; they can be prepared by or for the party or the party's representative, so long as they are prepared in anticipation of litigation. *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985).

This Court has the authority to determine the matter and dismiss based on the record: jail personnel were aware the mail was confidential and deliberately mail and documents marked as legal mail. Even assuming *arguendo* that the mail was not read, as contended by the State in its response, the egregiousness of the States' conduct cannot be condoned. Accordingly, dismissal is merited. *Fuentes*, 179 Wn.2d at 853.

2. <u>THE PETITION FOR COLLATERAL RELIEF IS TIMELY</u>

Under RCW 10.73.090(1), a petitioner may file a collateral attack on a criminal judgment and sentence up to one year after the judgment becomes final

if the judgment and sentence is valid on its face and was rendered by a court that had jurisdiction. The judgment becomes final either on the date it is filed with the clerk of the trial court or on the date the appellate court issues its mandate disposing of a direct appeal from the conviction, whichever comes last. RCW 10.73.090(3). This one year time limit is, however, subject to certain exceptions. RCW 10.73.100. In this case, the petition was filed within "one year" of his judgment, considering that the judgment was later substantively modified, and because the judgment was invalid on its face.

a. Invalidity on its face.

The time limits applicable to collateral attack such as a do not apply if the judgment and sentence is invalid on its face. Under RCW 10.73.090(1), a petitioner must bring a collateral attack within one year "after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction." RCW 10.73.090's one-year time bar does not apply if the judgment and sentence is "invalid on its face." *In re Pers. Restraint of McKiearnan*, 165 Wn.2d 777, 783, 203 P.3d 375 (2009).

"Invalid on its face" means the judgment and sentence evidences the invalidity without further elaboration. *In re Pers. Restraint of Hemenway*, 147 Wn.2d 529, 532, 55 P.3d 615 (2002). Where a judgment and sentence imposes a sentence in excess of the sentencing court's statutory authority, the time limits

for collateral attack do not apply. See *In re Pers. Restraint of Tobin*, 165 Wn.2d 172, 176, 196 P.3d 670 (2008) (judgment invalid on its face where it exceeded statutory authority); see also, *In re Coats*, 173 Wn.2d 123 267 P.3d 324 (2011) (citing examples of "errors rendering a judgment invalid under RCW 10.73.090 where a court has in fact exceeded its statutory authority In entering the judgment or sentence"); see also, *State v. Besio, supra.*

Here, the trial court's judgment and sentence was invalid on its face and also void under *Besio*. As noted *supra*, the judgment and sentence imposed imprisonment in a DOC facility for Counts 5 and 6, and thus exceeded the sentencing court's statutory authority.

b. The petition was timely filed.

In addition, Mr. Amos petition was timely as filed within one year of the "final judgment.' His original petition was filed within one year of the trial court's January 5, 2015, order which vacated the modified the Judgment and Sentence entered October 31, 2015. The petition was mailed on January 5, 2015 from Stafford Creek Correctional Center. Petition at 3.

The "final judgment" in the case therefore took place when the amended judgment and sentence was vacated on January 8, 2016. RP (1/8/15) at 12. Thus, the judgment arising from the plea agreement became final on that date for purposes of RCW 10.73.090(3). Mr. Amos filed his personal restraint petition

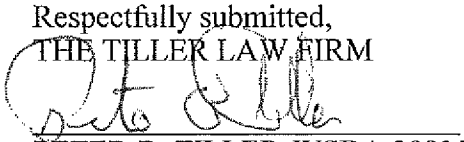
several months on January 5, 2015. The petition was filed within one year of the Order Modifying Judgment, which must be considered the "final judgment" considering that it expressly vacated the order amending the Judgment and Sentence, and therefore it is not time-barred and is subject to review by this Court.

E. CONCLUSION

Mr. Amos has demonstrated, in the arguments above and in his pro se PRP and Reply Brief, that he was deprived of his constitutional and statutory rights to effective assistance of trial counsel, and that this court should vacate his convictions pursuant to *Cory*, *Perrow*, and its progeny, or alternatively, remand for resentencing to vacate the gross misdemeanor charges in Counts 5 and 6. In addition, this Court should adopt a bright line rule permitting collateral attack of a negotiated plea agreement despite the presence of a waiver purporting to preclude further appeal or collateral attack.

DATED: November 3, 2016.

Respectfully submitted,
THE TILLER LAW FIRM



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CERTIFICATE OF SERVICE

The undersigned certifies that on November 3, 2016, that this Appellant's Corrected Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste.300, Tacoma, WA 98402-4454 and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on November 3, 2016.

PETER B. TILLER

APPENDIX A

RAP RULE 16.4
PERSONAL RESTRAINT PETITION-GROUNDS FOR REMEDY

(a) Generally. Except as restricted by section (d), the appellate court will grant appropriate relief to a petitioner if the petitioner is under a "restraint" as defined in section (b) and the petitioners restraint is unlawful for one or more of the reasons defined in section (c).

(b) Restraint. A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

(c) Unlawful Nature of Restraint. The restraint must be unlawful for one or more of the following reasons:

(1) The decision in a civil or criminal proceeding was entered without jurisdiction over the person of the petitioner or the subject matter; or

(2) The conviction was obtained or the sentence or other order entered in a criminal proceeding or civil proceeding instituted by the state or local government was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington; or

(3) Material facts exist which have not been previously presented and heard, which in the interest of justice require vacation of the conviction, sentence, or other order entered in a criminal proceeding or

civil proceeding instituted by the state or local government; or

(4) There has been a significant change in the law, whether substantive or procedural, which is material
to the conviction, sentence, or other order entered in a criminal proceeding or civil proceeding instituted
by the state or local government, and sufficient reasons exist to require retroactive application of the
changed legal standard; or

(5) Other grounds exist for a collateral attack upon a judgment in a criminal proceeding or civil
proceeding instituted by the state or local government; or

(6) The conditions or manner of the restraint of petitioner are in violation of the Constitution of the
United States or the Constitution or laws of the State of Washington; or

(7) Other grounds exist to challenge the legality of the restraint of petitioner.

(d) Restrictions. The appellate court will only grant relief by a personal restraint petition if other
remedies which may be available to petitioner are inadequate under the circumstances and if such relief may
be granted under RCW 10.73.090, or .100. No more than one petition for similar relief on behalf of the same
petitioner will be entertained without good cause shown.

RCW 10.73.090

Collateral attack—One year time limit.

(1) No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment becomes final if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction.

(2) For the purposes of this section, "collateral attack" means any form of post-conviction relief other than a direct appeal. "Collateral attack" includes,

but is not limited to, a personal restraint petition, a habeas corpus petition, a motion to vacate judgment, a motion to withdraw guilty plea, a motion for a new trial, and a motion to arrest judgment.
(3) For the purposes of this section, a judgment becomes final on the last of the following dates:
(a) The date it is filed with the clerk of the trial court;
(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction; or
(c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. The filing of a motion to reconsider denial of certiorari does not prevent a judgment from becoming final.
[1989 c 395 § 1.]

RCW 10.73.100
Collateral attack—When one year limit not applicable.
The time limit specified in RCW 10.73.090 does not apply to a petition or motion that is based solely on one or more of the following grounds:
(1) Newly discovered evidence, if the defendant acted with reasonable diligence in discovering the evidence and filing the petition or motion;
(2) The statute that the defendant was convicted of violating was unconstitutional on its face or as applied to the defendant's conduct;
(3) The conviction was barred by double jeopardy under Amendment V of the United States Constitution or Article I, section 9 of the state Constitution;
(4) The defendant pled not guilty and the evidence introduced at trial was insufficient to support the conviction;
(5) The sentence imposed was in excess of the court's jurisdiction; or
(6) There has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard.

TILLER LAW OFFICE

November 03, 2016 - 4:52 PM

Transmittal Letter

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